of a payment at the end of the employment, and a payment does not necessarily cease to be remuneration for services because it is payable when the services come to an end. He did not criticise the passage from Rowlatt's J.'s judgment cited above. In *Comptroller-General of Inland Revenue* v. *Knight*[4] the decision in *Chibbett* v. *Joseph Robinson* was approved; and their Lordships in this case see no reason to dissent from or to question the proposition that for a payment to be compensation for loss of employment, there must be a real prospect of future employment. If that does not exist, then the payment cannot be compensation for the loss of earnings for the prospect of future earnings is not there."

The other recent case on termination payment is that of *H.M.T.* v. *Director-General of Inland Revenue*.[12] There appellant, on his third short term contract, had his services terminated while on leave in Denmark. He was paid $74,954.32 as gratuity on retirement. Abdul Hamid J. upheld the decision of the Special Commissioners that the payment was made in respect of his employment with the company and, therefore, a gratuity within the meaning of section 10(2)(a) of the Income Tax Ordinance, 1947. The facts in *HMT's* case[12] were admittedly similar to the facts in *Heywood's* case[10] and he considered rightly himself bound by it. When *HMT's* case[12] came before this court on appeal the Privy Council had already given their advice in *Heywood's* case[1] reversing the decision of this court. Had the learned judge had the advantage of the Privy Council decision in *Heywood's* case[1] he would not have come to the conclusion which he did. Gill C.J. (Malaya) delivering the judgment of this court with which the other two members concurred, said at page 25: —

"The facts in this case were almost identical with the facts in *Heywood's case*. The element of expectation in this case was more manifest in that the appellant was provided with a return ticket for himself and his family. There was some evidence that on his return he was to be made the manager of an estate. There was also some evidence that the appellant's services were terminated on account of Malayanisation. A payment on deprivation of an expectation of employment should be treated as compensation for loss of employment regardless of what it was called by the employers."

On the question that the payment made to the taxpayer was an emolument or an inducement to continue in employment, the case of *Pritchard* v. *Arundale*[13] was cited by both parties. The brief facts in that case are that a senior partner in a firm of chartered accountants was invited to join a company as full time joint managing director. In consideration of this 4,000 shares in the company were transferred to him. Held that the transfer of shares was not an emolument in the nature of a reward for services. Megarry J. made it clear that the payment must be made in reference to the services rendered under the office or employment, and as a reward for them and this would not be the same as a payment made "for" undertaking the office or employment. He made clear that the decision was not meant to provide as a sort of passport for tax-free emoluments disguised as initial lump sum inducements to enter an employment: for it was the realities of the payment that matter. In other words, one must look into the facts of each particular case to decide the nature of payment.

It would seem that when Gill F.J., as he then was, delivered his judgment in the High Court in *Heywood's* case[10] the judgment of the Privy Council in *Knight's* case[4] had not come to his notice otherwise he would have mentioned it. Because he was doubtful as to the correctness of his decision in *Heywood's* case[10] he decided to reserve his judgment in the present case until the judgment of the Privy Council in *Heywood's* case[1] was available to him. I agree with him that the facts in the present case are not very different from the facts in *Heywood's* case.[1] He found no difficulty in deciding the question in issue. It was contended that the learned judge disregarded the findings of facts by the Special Commissioners by which an appellate tribunal was bound. An appellate court would be slow to interfere with the finding of fact by a subordinate court. However, inferences from facts stated by the Commissioners are matters of law, and can be questioned on appeal and this applies to construction of documents. See *Cameron* v. *Prendergast*.[8] The irresistible inference to be drawn from the facts of the present case in the light of the relevant provisions of the Income Tax Act 1967 is that the money paid to the taxpayer was compensation for loss of employment and not taxable by virtue of the exemption. With respect, the learned judge was, therefore, right to reverse the decision of the Special Commissioners. I would, therefore, dismiss the appeal with costs both here and below.

Ong Hock Sim and **Wan Suleiman F.JJ.** concurred.

Appeal dismissed.

Solicitors: *Shearn, Delamore & Co.*

ELECTRICAL INDUSTRY WORKERS UNION v. REGISTRAR OF TRADE UNIONS & ANOR.

[F.C. (Lee Hun Hoe C.J. (Borneo), Ong Hock Sim and Wan Suleiman F.JJ.) December 22, 1975]
[Kuala Lumpur — Federal Court Civil Appeal No. 77 of 1975]

Administrative Law — Application for declaration — Whether trade union has exclusive right to decide whether workmen within scope of membership — Whether Registrar of Trade Unions empowered to rule on eligibility of workers to join trade union — Alternative remedy by way of appeal — R.S.C. 1957, O.54A — Trade Unions Ordinance, 1959, s. 2(2).

Practice and Procedure — Application for declaration — Whether properly made by originating summons — R.S.C. 1957, O.54A.

In this case the appellants wished to absorb into its membership the workmen employed by Mosanto Electronics Sdn. Bhd. The Registrar of Trade Unions ruled that a worker employed in the electronic industry did not come within the definition of workmen in the rules of the appellants' union. The appellants applied by originating summons for declarations *inter alia* (a) that they had the exclusive power to decide whether workers are within the scope of their membership under the rules of the trade union and (b) that the Registrar of Trade Unions has no power to rule on the eligibility of the workers to join the trade union or to forbid the trade union from taking the said workers as its members. The learned judge of the High Court dismissed the application (*ante* p. 79) and the appellants appealed to the Federal Court.

Held, dismissing the appeal: (1) the learned judge was not bound to make the declaratory orders if he considered that the question of construction ought not to be brought by way of originating summons;

(2) (Wan Suleiman F.J. dissenting) the learned judge was correct in striking out the application on the ground that the procedure by way of originating summons was not suitable in challenging the decision of the Registrar of Trade Unions as the question of membership in this case involved the application of facts pertaining to the work of electric workers and the work of electronic workers respectively;

(3) (*per* Lee Hun Hoe C.J. and Ong Hock Sim F.J.) the court was being asked in this case to define and draw up guidelines for the Registrar of Trade Unions as to his functions under the Trade Union Ordinance and the manner he is to carry them out and this the court should not do as it would have the effect of fettering the discretion rested in the Registrar;

(4) (*per* Wan Suleiman F.J.) the court should not make a declaratory judgment where an alternative remedy has been laid down.

Cases referred to:-

(1) *Sungei Wangi Estate* v. *Uni* [1975] 1 M.L.J. 136.
(2) *Re Nobbs* [1896] 2 Ch. 830.
(3) *Morgan's Brewery Co.* v. *Crosskill* [1902] 1 Ch. 898.
(4) *Re William Thomas & Co. Ltd.* [1915] 1 Ch. 325.
(5) *Re Birkenhead Corporation* [1952] Ch. 359.
(6) *Re 56 Denton Road Twickenham* [1953] Ch. 51.
(7) *Mason* v. *Schuppisser* (1889) 81 L.T. 147, 148.
(8) *Rigden* v. *Whitstable Urban District Council* [1958] 2 All E.R. 730.
(9) *Employees Provident Fund Board* v. *Goh Tiong Tan* [1958] M.L.J. 54.
(10) *In re Barnato deceased* [1949] 1 Ch. 21, 27.
(11) *In re Clay* [1919] 1 Ch. 66.
(12) *Attorney-General, Malaysia* v. *Chemical Workers Union of Malaya* [1971] 1 M.L.J. 38, 40.
(13) *Thomas* v. *Attorney-General* [1937] 1 Ch. 72, 75-80.
(14) *Pountney* v. *Griffiths* The Times June 25, 1975.
(15) *Nicholls* v. *Nicholls* (1899) 81 L.T. 811.
(16) *Manggai* v. *Government of Sarawak & Anor.* [1970] 2 M.L.J. 41.
(17) *Wilkinson* v. *Barking Corporation* [1948] 1 K.B. 721.

FEDERAL COURT.

D. P. Vijandran for the appellants.

Zaleha binte Zahari (Federal Counsel) for the respondents.

Lee Hun Hoe C.J. (Borneo) (read by **Ong Hock Sim F.J.**): This is an appeal against the decision of the learned judge. The facts have been set out by the learned judge quite clearly at page 96 of the Appeal Record as follows: —

"The matter arose from the attempt by the Union to absorb into its fold the workers employed by Monsanto Electronics Sdn. Bhd. The Union thought that these workers came within its membership clause, as being persons engaged in similar trades, occupations or industries. The Registrar of Trade Unions thought otherwise. In his view electronic was not synonymous with electrical and a worker employed by that firm did not come within the definition of worker in the Union's rules. He therefore refused to allow the enlistment of the workers of the Monsanto Electronics Sdn. Bhd. into the Electrical Industry Workers Union."

In so doing, he purported to act under section 2(2) of the Trade Unions Ordinance 1959 which reads: —

"2(2) for the purposes of the definition of 'trade Union' in sub-section (1) and for the purposes of sections 72 and 74, 'similar' means similar in the opinion of the Registrar."

Appellants applied by Originating Summons under the provisions of O.54A of the Rules of the Supreme Court for four declarations, namely: —

(a) A declaration that the *Applicant Union has the exclusive power to decide whether* the workers employed by the company registered as Monsanto Electrical Sdn. Bhd. are within the scope of membership of the said Union under Rule 3(1) of the Union's Rules.
(b) A declaration that the said Union is entitled to register the said workers as its members.
(c) A declaration that the Registrar of Trade Unions is not empowered under section 2(2) of the Trade Unions Ordinance, 1959 or at all to rule on the eligibility of the said workers to join the said Union.
(d) A declaration that the Registrar of Trade Unions has no power under section 2(2) of the Trade Union Ordinance or at all to forbid the said Union from taking in the said workers as its members.

The first two declarations involved the construction of Rule 3(1) of the Rules of the Electrical Industry Workers Union and the remaining two declarations the interpretation of section 2(2) of the Trade Unions Ordinance, 1959.

Rule 3(1) of the Rules of the Electrical Industry Workers Union reads: —

"Membership of the Union shall be open to all employees excluding managerial staff, confidential staff and security guards, in the manufacture and repair of dry cells, batteries, manufacture and repair of air-conditioners and refrigerator and manufacture and repair of miscellaneous electrical apparatus, who are above the age of sixteen and whose place of work is in West Malaysia, provided that no person for whom education is provided under the Education Ordinance, 1957, shall join or be a member of the Union unless he is:

(a) *bona fide* employed as a workman as defined in the Trade Unions Ordinance, 1959 and
(b) over the age of eighteen years."

Appellants contended that it is for them to decide membership. The reason is that under Rule 12(14) it is provided that: —

"Between annual general meetings the Executive Council shall interpret the Rules and, when necessary, determine any point on which the Rules are silent."

At a meeting of the Executive Council held on January 20, 1974 it was decided that workers of the Monsanto Electronics came within the membership clause, that is, Rule 3(1).

A preliminary objection was taken by respondents regarding the form of application. It was contended that the declarations asked for could not be brought under O.54A r.1 by way of Originating Summons. O.54A r.1 provides that: —

"Any person claiming to be interested under a deed, will, or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested."

Sungai Wangi Estate v. *Uni*[1] was cited in support. Chang Min Tat, J. pointed out that in that case Abdoolcader, J. held that no declarations could be applied for by way of originating motion save in such cases as had been expressly provided by statute. He went on to say: —

"Insofar as an originating summons under O.54A is concerned, the decision must be determined by the consideration whether the subject matter came within the provisions of this Order. Mr. D.P. Vijandran contended that the construction of the rules of the trade union came within O.54 r.1, but to my mind, the rules could not, by the *ejusdem generis* principle of construction, come within the 'deed, will or other written instrument' in that rule."

This, the appellants argue, shows that the learned judge has completely misconstrued the ambit of the words "written instrument" in O.54A r.1. They say those words have been given very wide scope in decided cases. These cases have not been confined to deeds, wills and their genre. The cases they cited cover a wide variety of written documents, namely, in *Re Nobbs*[2] (a mortgage deed); *Morgan's Brewery Co.* v. *Crosskill*[3] (Articles of Association of a Company); *Re William Thomas & Co. Ltd.*[4] (Memorandum of a Company).

Re Birkenhead Corporation[5] (Resolutions of a Municipal Corporation); and *Re 56 Denton Road Twickenham*[6] (a letter). Apart from these cases they also cited *Mason* v. *Schuppisser*[7] where Stirling, J. speaking of the scope of O.54A r.1 (which was said to be in *pari materia* with ours), said: —

"It seems to me that the word 'instrument' was meant to receive a wide construction, and that it would apply to any written document under which any right or liability whether legal or equitable, exists."

It was thus submitted that O.54A r.1 is wide enough to cover construction of the written rules of a Trade Union. On the other hand, respondents submitted that the learned judge was right. Appellants chose to proceed by way of originating summons under O.54A r.1. It was contended that what was done was outside O.54A r.1. Where the question of membership involves the application of facts, originating summons is not suitable in challenging the decision of the Registrar of Trade Union. Thus, an application by originating summons is not the appropriate method of questioning the validity of an enforcement notice. See *Rigden* v. *Whitstable Urban District Council.*[3]

Reference may be made to the case of *Employees Provident Fund Board F. M.* v. *Goh Tiong Tan*[9] which was not cited by either party but the facts are similar. There plaintiffs took out an originating summons applying for the determination of the questions "whether or not the lighter workers (taikongs and boatmen referred to in the plaintiffs' affidavit) are 'employees' as defined in section 2 of the Employees Provident Fund Ordinance, 1951." The preliminary question was raised as to whether the proceedings were correctly brought by originating summons. Hepworth J. held that as there was nothing in O.52 which provided for the issue of an originating summons in the circumstances of the case and as there was no statutory provision applicable, there was no jurisdiction at all in the case and therefore no order could be made on the summons.

It is not a question of whether appellants wanted the facts to be before the court or whether respondents dragged the facts in. It is for the court to decide whether it is necessary to enter into the realm of facts. Once the court decides in the affirmative, the inevitable conclusion is that the originating summons is not an appropriate form for bringing the matter to court. The proper way is for appellants to proceed by way of action. On the matter of declaration on originating summons, it is a matter of the exercise of discretionary power of the learned judge. O.54A r.4 states clearly that: —

"The Court of Judge shall not be bound to determine any such question or construction if in their or his opinion it ought not to be determined on originating summons."

Quite apart from the right of appeal against the decision of the Registrar under section 17(1) of the Trade Union Ordinance to the Minister of Labour, a court should be slow to aid appellants particularly when the rules of the Union are not clear on the membership of electronic workers. The appellants' contention is that it is for the Union to say who are to be its members. Rule 12(14) does not give the Executive Council such wide powers as to construe the Union's rules in such a manner as to make members out of those in different industries. Whether a person in a related or similar industry becomes a member of a particular union is squarely a matter for the decision of the Registrar of Trade Unions. If a particular union can say it is for the Union to decide whether those in another industry might be absorbed as members of the Union a dangerous situation would develop whereby each and every union in the country would do the same. This could produce disastrous result for the country. It is for the Union to satisfy the Registrar of Trade Unions that the Monsanto Electronics Workers Union belong to the same or similar industry as the Union. What is sought by the originating summons is a declaratory judgment as to the functions and powers of the Registrar of Trade Unions. I think the court must decline to exercise its discretion in making any declaration which would fetter the Registrar in the exercise of his duties imposed on him by the Ordinance. It would seem that if the Registrar of Trade Unions acted in good faith in the performance of his duties he would be protected by section 6 of the said Ordinance.

I cannot say that the learned judge was wrong in the view he took of the matter. He thought it would not be possible to divorce the consideration of the application from certain facts pertaining to the work of electrical workers and the work of electronic workers respectively. In the circumstances of the case, he considered that the objection was well founded. He, therefore, struck out the application. Even if the learned judge has misconstrued O.54A r.1 which, with respect he has not, he is not bound to make the declaratory orders if he considers that the question of construction ought not to be brought by way of originating summons. That was what happened in this case. That the learned judge had exercised his discretion properly has not been questioned.

For reasons given, I would, therefore, dismiss the appeal with costs both here and below.

Ong Hock Sim F.J.: This is an appeal from the decision of Chang Min Tat J. dismissing an application by way of originating summons for the following declarations: —

(a) A declaration that the Applicant Union has the exclusive power to decide whether the workers employed by the company registered as Monsanto Electronic Sdn. Bhd. are within the scope of membership of the said Union under Rule 3(1) of the Union's Rules.

(b) A declaration that the said Union is entitled to register the said workers as its members.

(c) A declaration that the Registrar of Trade Unions is not empowered under section 2(2) of the Trade Unions Ordinance, 1959 or at all the rule on the eligibility of the said workers to join the said Union.

(d) A declaration that the Registrar of Trade Unions has no power under section 2(2) of the Trade Unions Ordinance or at all to forbid the said Union from taking in the said workers as its members.

The applicant purports to act under Order 54A rule 1 in respect of the first two declarations seeking construction of Rule 3(1) of the Applicant Union's Rules and rule 1A in respect of the other two, involving interpretation of section 2(2) of the Trade Unions Ordinance, 1959.

At the hearing a preliminary objection was made that the application was misconceived and no declaration under Order 54A can be made upon the Summons, relying on the decision of Abdoolcader J., in *Sungai Wangi Estate* v. *Uni*[1] who said: —

"I also raised the matter of the procedure adopted in applying for the declarations sought by way of originating summons.... Where no special procedure is laid down, the claim for a declaratory judgment is brought by way of a writ. In certain cases, however specified by legislation, a declaration may be sought on originating summons. Proceedings in which the sole or principal question at issue is, or is likely to be, one of the construction of any written law or of any deed, will, contract or other document, are appropriate to be taken by originating summons.... No declaration, in my view, can be applied for by way of originating motion save in such cases as have expressly been provided for by statute."

The relevant rules of Order 54A I now reproduce: —

"1. Any person claiming to be interested under a deed, will, or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested.

1A. Any person claiming any legal or equitable right in a case where the determination of the question whether he is entitled to the right depends upon a question of construction of any written law, may apply by originating summons for the determination of such question of construction, and for a declaration as to the right claimed."

It is urged upon us that the learned judge was in error in applying the *ejusdem generis* principle of construction to the phrase "deed, will, or other written instrument" in Order 54A and we were referred to the case of *Mason* v. *Schuppisser*[7] where Stirling J. said of a contract for sale: —

"First of all, is this a written instrument? It seems to me that the word 'instrument' was meant to receive a wide construction, and that it would apply to any written document *under which any right or liability, whether legal or equitable, exists.*" (The italics are mine).

Appellant's counsel referred us to various cases where the word "instrument" has been held to cover a wide variety of written documents. What is striking is that *in all those cases* the question arose *inter partes* and *referred to persons who had a claim and were interested under the instrument.*

As the learned judge also said: —

"Insofar as an originating summons under Order 54A is concerned, the decision must be determined by the consideration whether the subject matter came within the provisions of this Order."

That was what Harman J. so clearly stated called for determination in the first instance in *In re Barnator, Decd.*[10] when asked to construe question 3: "If the plaintiffs have power to and do advance any further sum, whether they will be accountable for any estate duty which may become payable on such further sum on the death of the said Lily Asher notwithstanding that such further sum is no longer vested in them and if so whether they ought to make any and what provision out of such further sum or otherwise for the possibility that such estate duty may become payable";

"I must, therefore, consider *whether* question 3 of *the summons is one that comes within the Rules* of court, *for procedure by way of originating summons being a creature of statute can only be resorted to in cases provided for by the rules....* As to the first of these the plaintiffs must be persons, claiming a 'legal or equitable right', such right depending upon a question of construction of a statute. In my judgment the plaintiffs are not here claiming any legal or equitable right, for no claim for duty at present exists.... It is true that the commissioners have alleged that their present view is that a claim may hereafter arise, but no present claim has been made, nor has any right or interest yet arisen in the Crown which is sought to be affected. The case of *In re Clay*[11] shows that there was no jurisdiction to make a declaratory order in a case where the defendant had put forward no present claim." (The italics are mine).

What is sought by the appellant in this appeal? His counsel says: —

"Of the four declarations asked for, the first two deal with the Union's rules. We were seeking to establish that according to the rules of the Union, *the power to decide* on the scope of membership of the Union *lay with the Union itself.* By the next two declarations, we sought to establish that on a proper construction of section 2(2), the *Registrar was not empowered to rule* (on) the eligibility of workers to join the Union or to forbid the said Union from taking in the said workers." (The italics are mine).

In my view, the first two declarations interest only the Union. The Registrar of Trade Unions is only interested in compliance with the rules. As Abdul Aziz J. said in *Attorney-General, Malaysia* v. *Chemical Workers' Union of Malaya and Another*[12]: —

"... it seems to me that once a trade union is registered it is bound by the rules of its constitution. It can only represent that category or class of workmen as is specified in its rules. If a trade union desires to extend its membership clause to include workmen engaged in other categories of work or industry, it should first amend its rules."

In regard thereto, the Appellant Union submitted that "this is purely a question of construction of Rule 3(1) and 12(4). The court was called upon just to construe these two rules and decide whether (a) the Union has the exclusive power to decide on whether the members of a particular named company were within the scope of the membership clause, and, if it has such exclusive power, that (b) the Union is entitled to register the workers as its members."

Rule 3(1) reads: —

"Membership of the Union shall be open to all employees excluding managerial staff, confidential staff and security guards, in the manufacture and repair of dry cells, batteries, manufacture and repair of air-conditioners and refrigerator and manufacture and repair of miscellaneous electrical apparatus, who are above the age of sixteen and whose place of work is in West Malaysia, provided that no person for whom education is provided under the Education Ordinance, 1957, shall join or be a member of the Union unless he is:
(a) *bona fide* employed as a workman as defined in the Trade Unions Ordinance, 1959 and
(b) over the age of eighteen years."

Rule 12(14) provides: —

"Between annual general meetings the Executive Council shall interpret the Rules, and, when necessary, *determine any point on which the Rules are silent.*" (The italics are mine).

It was pointed out that on January 20, 1974, the Council had decided that workers of Monsanto Electronics came within Rule 3(1), which would appear to require this court merely to rubber-stamp its determination and intervene in a matter which is clearly within

the province of the Registrar and for which procedure in the event of disagreement is laid down in the Ordinance. It is not that Rule 3(1) is silent on the point but what is desired is for the court to read more into it because the Registrar has refused to do so. In my view, the application is misconceived and it is not out of place here to draw attention to Order 54A rule 4 which provides: —

"4. The court or judge shall not be bound to determine any such question of construction if in their or his opinion it ought not to be determined on originating summons."

The learned judge concluded his judgment by saying: —

"I took the further view that it would not be possible to divorce the consideration of the application from certain facts pertaining to the work of electrical workers and the work of electronic workers respectively and in all the circumstances of the case, thought the objection well-founded. I therefore struck out the application...."

It is, in my opinion, unnecessary to decide whether the application of the *ejusdem generis* rule is or is not correct but I am in full agreement with the learned judge that *in all the circumstances*, the preliminary objection is well taken. The Registrar had not taken any action for cancellation or withdrawal of its certificate of registration against the Union, as the Union had not, as yet, acted in contravention of section 15(1)(b)(v).

As Lord Greene M. R. said, on appeal in *In re Barnato, Decd.*[10]: —

"Both Mr. Christie and Mr. Jopling have argued that the question which they wished the court to decide is not a future question and is not a hypothetical question. First, it was said that the Crown has expressed an opinion that in certain events it will be entitled to make a claim. That expression of opinion Mr. Christie wished to lift into the order of things where the Crown makes a claim. The Crown has made no claim, for the very simple reason that it is not entitled to make a claim."

The Registrar has expressed an opinion and if that were disregarded by the Union, it may well be that he may take action under section 15(1)(b)(v) or he may reconsider and refrain from doing so. It is true that the Union would like to be advised whether it has the sole and exclusive power to determine the scope of its membership. Even so, it is in my view, not for this court to arrogate the jurisdiction to decide on the summons where the Ordinance has by section 17 prescribed the procedure for the resolution of the difference of opinion. There is also, as *Zamir* says in the *Declaratory Judgment* (1962) pages 47-48, the undesirable consequence that such declaratory orders may, in subsequent proceedings upon the subject-matter of the opinion, embarrass the courts which would hardly be able to ignore it, and cause confusion and uncertainty to future litigants who may be left in doubt as to whether the particular facts of their case come under the advisory opinion rendered.

I will now deal with the latter two declarations sought by the Union. I am of the opinion that what the court is being asked to do is to define and draw up guidelines for the Registrar as to his functions under the Ordinance and the manner he is to carry them out. This, I do not think, this court should do. As was said by Farwell J. in *Thomas* v. *Attorney-General*[13]: —

"This is a summons taken out under Order LIVA, r.1A,... The summons is brought for the purpose of obtaining the determination by the court whether, having regard to the provisions of the Settled Land Act, 1925, and certain relative provisions in the private Acts of the Board, the powers which are given by the Settled Land Act, so far as they are wider than the powers given by the private Acts, may be exercised, and to that extent the powers of the private Act may be treated as extended.

The Attorney-General has taken the objection that the court ought not to entertain the application at all, as this is not a case where the trustees have purported to exercise some power, and some person who thinks himself aggrieved by the exercise of that power is seeking to obtain relief, nor is it a case where the Attorney-General himself is taking proceedings to obtain an order on the trustees not to do that which he alleges is in breach of their duty....

...it is a matter of real importance whether in a case of this kind it ought not to be left to the Attorney-General to take such steps as he thinks fit to move the court to restrain anything which he considers an improper use of the powers given to the trustees rather than to permit the trustees themselves to bring proceedings and obtain a decision upon a point which is not a practical one at the moment.

It is in each case a question of discretion whether the court ought to make a declaratory order and, in my judgment, in such a case as the present the court ought not to exercise its discretion by making such an order. If and when the Board acts in a way which the Attorney-General considers *ultra vires*, it will be for him to determine whether he will take proceedings or not. In my judgment, *the court ought not in a case of this kind to make an order which would or might have the effect of fettering the discretion vested in the Attorney-General.*" (The italics are mine).

I am of opinion that the Union cannot be said to be a person "interested under a deed, will or other written instrument" within the meaning of Rule 1 nor a person "claiming any legal or equitable right" which depends upon a question of the construction of a statute within the meaning of Rule 1A.

I would therefore dismiss this appeal with costs.

It is unnecessary for me to decide whether in view of section 17 of the Ordinance the Union ought first to exhaust its remedy before resorting to the High Court. The proviso to section 41 of the Specific Relief Act reads: —

"Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so."

and would appear to confirm that Order 54A is not the proper procedure.

In the absence of any allegation of *mala fides* on the part of the Registrar in arriving at his opinion, it seems to me also that the application cannot be maintained having regard to section 6 of the Trade Unions Ordinance 1959 which reads: —

"No suit shall lie against any public servant for anything done or omitted to be done by him in good faith without negligence and in intended exercise of any power or performance of any duty provided or imposed by this Ordinance."

(See *Pountney* v. *Griffiths*[14] — The Times, June 25, 1975).

Wan Suleiman F.J.: The facts which led to the application by way of Originating Summons before the learned judge are sufficiently set out on page 96 of the Appeal Record, and again in the judgment of my learned brother the Chief Justice, Borneo.

Regarding the first two declarations sought, namely: —

a) a declaration that the Applicant Union has the exclusive power to decide whether the workers employed by the company registered as Monsanto Electronic Sdn. Bhd. are within the scope of membership of the said Union under Rule 3(1) of the Union's Rules;

b) a declaration that the said Union is entitled to register the said workers as its members,

counsel for the appellants complains that the learned judge was wrong in holding that the rules of the Applicants' Trade Union, cannot, by the *ejusdem generis* principles of construction come within the "deed, will or other written instrument" phrase of Order 54A Rule 1 of the Rules of the Supreme Court, 1957.

On this point I would with respect say that he is correct. According to the Annual Practice 1960, in the English O.45a r.1 (which is identical with our O 54A r.1) the word "instrument" is meant to receive a wide construction, and applies to any written instrument under which any right or liability, whether legal or equitable exists. The authority for this proposition is the case of *Masion* v. *Schuppisser*.[7] In that case, Sterling J. construed a contract of sale but went on to state as examples of "written instruments," bills of lading and charter parties.

Counsel also referred to a number of authorities where a wide variety of documents were construed under this rule which is set out below: —

Re Nobbs[2] — A mortgage deed; *Morgan's Brewery Co.* v. *Crosskill*[3] — Articles of Association of a Company; *Re William Thomas & Co. Ltd.*[4] — Memorandum of a Company; *Re Birkenhead Corporation*[5] — Resolution of a Municipal corporation; *Re 56 Denton Road Twickenham*[6] — A letter.

Whilst the written rules of a trade union would appear to be a "written instrument" within the meaning of this rule, there appears to be some doubt whether the intention of the framers of this rule is "to facilitate the determination of short questions of construction which could be examined *without affidavits* upon the instrument itself...." (See *In Re Nobbs* — *supra*).

In Nicholls v. *Nicholls*[15] however Sterling J. took a different view, remarking that it would be unduly limiting the jurisdiction of the court if it were held that powers under this order was not to be exercised if a question of fact was to be decided. He proceeded to point out that Rule 3 which is again identical with our Rule 3 says: "The application shall be supported by such evidence as the court or a judge may require," and Rule 4 (also identical with ours) says: "The court or judge shall not be bound to determine any such question of construction if in their or his opinion it ought not to be determined on originating summons." It seems to be beyond dispute that Order 54A Rule 1 should not be read in isolation.

In the instant case, the preliminary objection taken before the learned judge in the court below was that the application did not properly come within the scope of O.54A, and that in the absence of any provision for such a matter the application should be by action. If the learned judge in holding that the objection was well founded so decided solely because questions of certain facts pertaining to the work of the electrical workers and the work of the electronic workers respectively were involved and that consideration of such fact brought it outside the scope of O.54A r.1, then I would with respect disagree with him.

However, it seems to me that his Lordship had the provisions of rules 3 and 4 well in mind and having perused the records, I find myself unable to say that he had erred in the exercise of his discretion under the last mentioned rule.

A decision on this appeal does not rest on this point alone.

In seeking to obtain declarations (c) and (d) appellants are in effect appealing against the Registrar of Trade Unions' opinion or ruling under section 2(2) of the Trade Unions Ordinance, 1959 that the workers of Monsanto Electronic Sdn. Bhd. are not workmen employed within a trade similar to that of the appellants' Union. Under section 17(1) of the Trade Unions Ordinance, 1959 any person dissatisfied with any opinion of the Registrar given under section 2(2) may within 30 days appeal to the Minister against such opinion.

In accordance with the principles laid down in *Manggai* v. *Govt. of Sarawak and Anor.*[16] citing with approval the English decision in *Wilkinson* v. *Barking Corporation*[17] where a statute creates a right, and in plain language, gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to that remedy or that tribunal, and not to others. The English Courts have also declined to entertain jurisdiction where a plaintiff seeks to bypass the appointed tribunal by seeking a declaration instead of following the prescribed statutory procedure. (See footnote 68 in *S.A. de Smith's* Judicial Review of Administrative Action, page 520).

In accordance with this principle the court should not make a declaratory judgment where an alternative remedy has been laid down. I therefore feel that for this reason also the Originating Summons was not properly brought.

I agree that this appeal should be dismissed with costs.

Appeal dismissed.

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